

98CV00267-EHN-MO

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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LIMPOS, S.A.,

98 CV 269

Plaintiff,

MEMORANDUM
AND
ORDER

- -against-

ERIC ARONSON and CAROLINE
ARONSON,

Defendants.

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RANDALL K. ANDERSON
Fishman & Herrmann
405 Lexington Avenue, 17th Fl.
New York, NY 10174
for plaintiff.

ERIC ARONSON
CAROLINE ARONSON
2 Applegreen Drive
Old Westbury, NY 11568
defendants pro se.

NICKERSON, District Judge:

Plaintiff Limpos, S.A. brought this action against defendants Eric and Caroline Aronson to recover on a promissory note. On August 3, 1998 this court entered default judgment against defendants. Defendants, acting pro se, now move to vacate the default.

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I. The Facts

Plaintiff's complaint sets forth the following facts. On or about May 1, 1997 plaintiff sold certain shares of stock to defendant Eric Aronson. The purchase agreement required Eric Aronson to pay for the shares within 60 days of transfer, and this obligation to pay was secured by a promissory note for \$325,000 principal and \$26,000 accrued interest, payable on June 30, 1997. The promissory note bears an interest rate of 8% and was executed by Eric Aronson and Caroline Aronson.

II. Procedural History

On January 14, 1998, plaintiff filed a complaint against defendants because the purchase price was unpaid and the promissory note overdue. Plaintiff served defendants with a summons and complaint on April 14, 1998. On June 26, 1998, having failed to receive an answer from defendants, plaintiff filed a request to enter a default judgment. The pro se defendants finally filed their answer on July 24, 1998. The court entered a default judgment for plaintiff on August 3, 1998.

III. Discussion

The court may vacate a default judgment if the default resulted from defendant's "mistake, inadvertence, surprise, or excusable neglect." Fed. R. Civ. P. 60(b). In deciding whether to vacate a default judgment, courts examine three criteria: "(1) whether the default was willful; (2) whether defendant has a meritorious defense; and (3) the level of prejudice that may occur to the non-defaulting party if relief is granted." Davis v. Musler, 713 F.2d 907, 915 (2d Cir. 1983). To justify vacating a default judgment resulting from a non-willful default, defendant must allege a "meritorious defense" to the action. Id. The defense "need not be ultimately persuasive at this stage." American Alliance Ins. Co., 92 F.3d at 61 (2d Cir. 1996). Rather, a "defense is meritorious if it is good at law so as to give the factfinder some determination to make." Id. (quoting Anilina Fabrique de Colorants v. Aakash Chems. & Dyestuffs, Inc., 856 F.2d 873, 879 (7th Cir. 1988)).

In view of the fact that the pro se defendants appear to have been confused and did file an answer before the default judgment was entered, and because they say they intend to appear at the upcoming status

conference before Magistrate Judge Azrack, the court determines that defendants' default was not willful.

In their answer defendants claim that plaintiff fraudulently misrepresented the market price of the stock and fraudulently concealed the fact that millions of shares were about to become freely tradeable, rendering the stock virtually worthless. Allegations of securities fraud must be plead with particularity. Federal Rules of Civil Procedure Rule 9(b); Securities Exchange Act of 1934 § 10(b); 15 U.S.C.A. § 78j(b). Defendants' conclusory allegations of fraudulent misrepresentation are insufficient to state a securities fraud claim. Accordingly, the court does not find that defendants have sufficiently shown a meritorious defense. Thus the court will not at this time grant defendants' motion to vacate the default judgment.

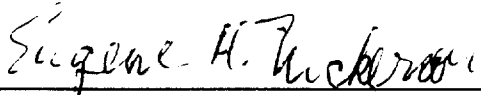
Given the strong preference for resolving disputes on the merits, however, see Brien v. Kullman Industries, Inc., 71 F.3d 1073, 1077 (2d Cir. 1995), the court grants defendants leave to renew their motion to vacate the default judgment within sixty days provided that they set forth in affidavits and with particularity what they claim was the fraud.

Defendants should consider Rule 9(b) and the pertinent cases interpreting it.

Defendants' motion to vacate the default judgment is denied without prejudice to refiling an amended motion to vacate within sixty days.

So ordered.

Dated: Brooklyn, New York
September 15, 1998



Eugene H. Nickerson, U.S.D.J.